

Original

DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED

MAR 30 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

)
)
)
)
)
)

DA 01-333

Amendment of Section 73.202(b),
Table of Allotments, FM Broadcast Stations
(Anniston and Ashland, AL, College Park,
Covington, and Milledgeville, Georgia

MM Docket No. 98-112 /
RM-9027
RM-9268
RM-9384

To: Mass Media Bureau

PETITION FOR RECONSIDERATION
AND REQUEST FOR PROTECTION

PRESTON W. SMALL
Timothy E. Welch, Esq.
Hill and Welch
1330 New Hampshire Ave., N.W. #113
Washington, D.C. 20036
(202) 775-0070
(202) 775-9026 (FAX)
welchlaw@clark.net

March 30, 2001

No. of Copies rec'd 0+4
List A B C D E

TABLE OF CONTENTS

TABLE OF CONTENTS	i
SUMMARY	ii
Procedural Issues	1
Mr. Small's March 12, 2001 Petition for Reconsideration and Protection Request	1
Justification for Reconsideration of the <i>MO&O</i>	2
The <i>MO&O</i> Fails to Discuss The Earlier WHMA Reallocation Proposal	4
Signal Population Coverage	6
Size and Proximity to the Urban Center	9
The <i>Tuck</i> Analysis	10
Work Patterns	10
Local Newspaper	14
Perceptions, Elected Officials, Telephone Directory, Zip Code	16
Commercial Establishments, Health Facilities, Transportation Systems	18
Advertising Market	20
Municipal Services and Zoning/Building/Plumbing Codes	21
Conclusion	22

SUMMARY

The Commission has released two orders which have approved WNNX's request to reallocate Station WHMA to the Atlanta Urbanized Area. Extensive comments and reply comments were submitted in the proceeding, yet the Commission has failed to discuss numerous significant factual and legal issues. For instance, the Commission has previously denied a request to move Station WHMA to the Atlanta Urbanized Area. This fact was brought to the Commission's attention by several commenters. Instead of referring to this case, the Commission relies upon cases which are readily distinguishable on the facts and the Commission completely ignores the case which denied reallocation.

It seems that the starting point in examining whether WNNX is merely engaging in a "technical manipulation" of the rules would be to examine the first case which denied authority for Station WHMA to relocate to the Atlanta Urbanized Area. The Commission cannot possibly determine whether there is a technical manipulation of its rules without first comparing WNNX's request with the request which was denied several years ago.

Incredibly, the *MO&O* attempts to remove the Atlanta Airport from the economic consideration of the case because no one lives at the airport. The airport is the single defining economic characteristic of College Park and WNNX placed principal reliance upon the airport as demonstrating College Park's economic independence, that is until WNNX learned that the airport is owned by the City of Atlanta. It is improper to exclude the single, biggest economic engine in College Park merely because "no one lives at the Airport." The economic question does not turn upon whether people reside at the business establishments in College Park, the question is do the business establishments in College Park indicate that College Park's economy is intertwined with the economy of the Atlanta Urbanized Area.

The discussion of the *Tuck* factors in the *MO&O* is nothing more than a mechanical application of purported facts. In many cases the Commission ignores facts, such as regional transportation systems and work flows, and in other cases the Commission is just plain wrong on the facts, for instance, that the City of Atlanta is “excluded” from a newspaper which covers College Park. In the end, the *Tuck* analysis in the *MO&O* reads as if the Commission were merely determining whether College Park is an identifiable community for allocation purposes rather than determining whether College Park is economically intertwined with the Atlanta Urbanized Area. The *MO&O* fails to discuss the argument that many *Tuck* factors, such as zip codes, building codes, existence of local government, local perceptions, do not explain community economic relationships.

The *MO&O* also mishandles the signal population coverage issue and the size and proximity issue. The *MO&O* states that the issue is whether WNNX proposes to cover the entire urbanized area, when the test in this case, based upon the Commission’s earlier refusal to authorize reallocation of Station WHMA to Atlanta, is whether WNNX proposes to place its antenna in the central city of Atlanta. Because WNNX proposes to place its antenna within the City of Atlanta, WNNX cannot prevail on the signal coverage issue just its predecessor could not prevail on the same issue. Regarding size and proximity, College Park either adjoins the central City of Atlanta or it is no more than 2 miles away. In either case, College Park has a very small population compared to Atlanta and the Atlanta Urbanized Area and College Park cannot prevail on the size and proximity issue just as its predecessor could not prevail on the size and proximity issue. Because WNNX does not prevail on the signal population coverage issues nor the size/proximity issues, the amount of evidence required to show economic interdependence is quite small. The amount of economic interdependence evidence presented to the Commission was quite large, the Commission has just ignored it to date.

Preston W. Small (Mr. Small), by his attorney, hereby seeks reconsideration of the February 9, 2001 *Memorandum Opinion and Order (MO&O)*, DA 01-333. In support whereof, the following is respectfully submitted:

Procedural Issues

Mr. Small's March 12, 2001 Petition for Reconsideration and Protection Request

a.1) The text of the subject *MO&O* was released to the public on February 9, 2001. The text of the *MO&O* does not state that notice of the *MO&O* would be published in the Federal Register, at least undersigned counsel could not find any such language. The Commission's rules at 47 C.F.R. § 1.429 does not state that denials of petitions for reconsideration will be published in the Federal Register and 47 C.F.R. § 1.427(a) contemplates Federal Register publication only for "any rule issued by the Commission." Because the *MO&O* does not issue any rules, it was not expected that a summary of the *MO&O* would be published in the Federal Register. As of March 12, 2001 the *MO&O* had not been published in the Federal Register and Mr. Small sought to ensure that his rights were protected by filing a petition for reconsideration on that date.

a.2) On March 14, 2001 the Commission published Federal Register notice of the *MO&O* which Mr. Small wishes to have reconsidered. 66 Fed. Reg. 14862 (March 14, 2001). Accordingly, Mr. Small is refiling his petition for reconsideration as a protective filing to avoid an argument that the March 12, 2001 petition was somehow premature notwithstanding the lack of clarity in the Commission's rules on this point. Moreover, because the rules are unclear on whether the Commission would publish the denial of a petition for reconsideration in the Federal Register, Mr. Small cannot, on his own motion, determine that his March 12, 2001 filing was premature and thus

Mr. Small cannot seek dismissal of that pleading.¹ However, because the substance arguments in the earlier pleading and the instant pleadings is the same, no changes have been made, and because the Commission's rules are unclear regarding whether the denial of a petition for reconsideration is to be published in the Federal Register, the Commission should determine that Mr. Small's reconsideration arguments are timely filed either as filed on March 12, 2001 or as filed instantly.²

Justification for Reconsideration of the *MO&O*

1) Mr. Small's June 16, 2000 *Petition for Reconsideration*, at 1, argued that the *Report and Order (Allocation Order)*, 15 FCC Rcd. 9971 (Alloc. Br. 2000) completely failed to discuss the facts and legal arguments raised in Mr. Small's August 31, 1998 *Comments* and in his September 15, 1998 *Reply Comments*. Mr. Small's *Petition for Reconsideration* reminded the Commission of "its obligation to review submissions and comment upon matters of decisional significance."

2) The *MO&O* responds to that request by presenting, for the first time, various responses to Mr. Small's arguments. Thus, for the first time, Mr. Small is presented with an opportunity to

¹ It could be that the *MO&O* was erroneously published in the March 14, 2001 Federal Register.

² On March 27, 2001 WNNX LICO, Inc. filed a *Statement for the Record* indicating that WNNX will wait for publication of Federal Register notice of the filing of Mr. Small's petition for reconsideration before filing its comments. The rules do not speak to what publication methods the Commission will use when the pleading seeks reconsideration of an order which denied reconsideration of a rulemaking order where the order does not alter any rules. While WNNX may, of course, proceed as it sees fit, Mr. Small would not raise a procedural objection if WNNX filed its comments within 15-18 days of service of the instant pleading in order to protect WNNX's position. Moreover, while WNNX's discussion of § 1.115 is thread bare, WNNX's point seems to be that if the Commission considers Mr. Small's pleading as an application for review, and because one does not have to wait for Federal Register publication to file an application for review, then WNNX should not be held to the opposition filing deadline specified in § 1.115. Mr. Small does not object to WNNX filing comments/opposition should the Commission determine that it will handle the matter as an application for review. However, WNNX seems to run a risk if it waits for a ruling which may never issue.

argue that the staff's reasoning regarding Mr. Small's arguments presented in his *Comments* and *Reply Comments* is not based upon substantial evidence and is otherwise deficient as a matter of law. Because Mr. Small is required to raise factual and legal comments regarding the staff's new reasoning in a petition for reconsideration, and because Mr. Small cannot raise them for the first time in an application for review filed with the Commission, *see* 47 C.F.R. § 1.115(c), the instant filing is procedurally proper. Moreover, because the *MO&O* modifies the earlier *Allocation Order* by, *inter alia*, providing new reasoning including and new legal authority, Mr. Small may properly seek reconsideration of the *MO&O*. *See Memorandum Opinion and Order*, 13 FCC Rcd. 21872 ¶ 6 (FCC 1998) (§ 1.429(i) permits subsequent reconsiderations when modifications are made to the original order).

3) Furthermore, because the *MO&O* again fails to address various significant factual and legal matters Mr. Small raised in his *Comments* and *Reply Comments*, the instant petition for reconsideration is not repetitious because the Commission is required to address significant factual and legal issues. *See Second Memorandum Opinion and Order*, 15 FCC Rcd. 14734 ¶ 5 (WTB 2000) (second petition for reconsideration dismissed pursuant to § 1.429(i) because the “two issues have been fully addressed in the” pertinent order); *see also Memorandum Opinion and Order*, 13 FCC Rcd. 21872 ¶ 6 (FCC 1998) (petitioner's arguments were repetitive because “the Commission previously considered and rejected every argument”); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-53 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (the function of a reviewing court “is to assure that the agency has given reasoned consideration to all the material facts and issues”); *see also Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1447 (D.C. Cir. 1995) (FCC reversed for failing to examine an issue which “should have been examined in a reasoned decision

making process.”). Mr. Small is entitled to a decision which discusses all material facts and legal issues. Because the *MO&O* fails to discuss significant facts and legal issues, even after being requested to do so, the *MO&O* is unreasoned and reconsideration is warranted.³

The *MO&O* Fails to Discuss The Earlier WHMA Reallocation Proposal

4) Mr. Small’s *Petition for Reconsideration* argued, *inter alia*, that while the *Allocation Order*, 15 FCC Rcd. 9971 ¶ 7 states that the Commission “will not blindly apply a first local service preference of the FM allotment priorities when a station seeks to reallocate its channel to a suburban community in or near an Urbanized Area,” *Petition for Reconsideration*, at 3 n. 1, the *Allocation Order* fails to discuss that the captioned proceeding is the second effort to move Station WHMA into the Atlanta market. It is clear that “blind application” of a first local service preference is a significant legal issue because the *MO&O* once again states that the Commission “will not blindly apply a first local service preference of the FM allotment priorities when a station seeks to reallocate its channel to a suburban community in or near an Urbanized Area.” *MO&O*, ¶ 5. While noting the importance of not being “blind” to what is being proposed, the *MO&O* proceeds to mechanically apply the *Tuck* factors to justify the relocation of Station WHMA to Atlanta without at all discussing that a party earlier tried to move Station WHMA to the Atlanta market, but was denied, and the

³ Should the Commission determine that the instant pleading is repetitious notwithstanding the foregoing, Mr. Small requests that the instant pleading be referred to the Commissioners for consideration as an application for review pursuant to 47 C.F.R. § 0.5(c) (“in non-hearing matters, the staff is at liberty to refer any matter at any state to the Commission for action, upon concluding that it involves matters warranting the Commission’s consideration.”). Should this course be chosen, Mr. Small requests the opportunity to file any conforming papers which the Commission deems necessary to handle the case in this manner and Mr. Small requests leave to file a supplemental pleading to ensure that material reviewed by the Commission is complete.

Commission has not yet responded to the argument that WNNX's proposal is merely a technical manipulation of the allocation rules to try to achieve something that has already been denied.⁴

5) The *MO&O* lists several cases to support the Commission's decision, but interestingly, the Commission fails to discuss *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd. 6580 (1991), *app. for rev dismissed*, 12 FCC Rcd. 8392 (1997), *app. for rev. dismissed* 13 FCC Rcd 2104 (1998) where the Commission denied an earlier request to relocate Station WHMA to Atlanta. The *MO&O* fails to explain why these other cases shed more light on a proposed relocation of Station WHMA to the Atlanta Urbanized Area than the Commission's earlier order which denied a proposed relocation of Station WHMA to the Atlanta Urbanized Area. While it would seem that the starting point would be a review of the earlier Station WHMA to Atlanta case, the complete failure to discuss the *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama* case constitutes a failure to engage in reasoned decision making and reconsideration is warranted.

6) The Commission has determined that

we have consistently given little or no weight to claimed first local service preferences if, given the facts and circumstances, the grant of a preference would appear to allow an artificial or purely technical manipulation of the Commission's 307(b) related policies.

Memorandum Opinion and Order, 5 FCC Rcd. 7094 ¶ 14(FCC 1990). The Commission further stated that

we recognize that an inflexible application of that preference, without further analysis, could consistently result in our finding that a reallocation leading to first local service for a suburb of a much larger adjacent metropolitan center justifies removing a local service from a more

⁴ *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd. 6580 (1991), *app. for rev dismissed*, 12 FCC Rcd. 8392 (1997), *app. for rev. dismissed* 13 FCC Rcd 2104 (1998).

remote community. We wish to dispel any concern that our new rule would lead to such a result.

Memorandum Opinion and Order, 5 FCC Rcd. 7094 ¶ 13 (FCC 1990). Without discussing the earlier attempt to relocate Station WHMA to Atlanta, the *MO&O* does, in fact, “blindly” apply the Commission’s reallocation policy while allowing a “technical manipulation” of its rules to occur, and while continuing to ignore significant facts and legal conclusions, including those which have already been made in the earlier reallocation case which denies Station WHMA authority to move its transmitter to the City of Atlanta and its city of license to the Atlanta Urbanized Area.

Signal Population Coverage

7) Ten years ago when it was first proposed that Station WHMA be reallocated to the Atlanta Urbanized Area the Commission determined that

With respect to signal population coverage, Emerald proposes to locate the antenna for its wide coverage area Class C1 station in the city of Atlanta. Therefore, Emerald has an extremely weak case under this factor for the award of a first local service preference.

Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama, 6 FCC Rcd. at 6584 ¶ 24. The issue is not whether WNNX proposes to serve the “entire Urbanized Area” as the *MO&O*, at ¶ 6, incorrectly concludes. The issue, as determined in the earlier Station WHMA case, is whether WNNX proposes to locate its antenna within the City of Atlanta, which it, in fact, proposes. *Petition for Reconsideration*, at 2 ¶ 4.⁵ The *MO&O* is unreasonable because it fails to consider the significant

⁵ In fact, WNNX has constructed the facility, at its own risk during this rulemaking proceeding, and WNNX has located the antenna within the City of Atlanta. Commission policy is clear that parties which proceed to construct a broadcast facility “before the allotment decision is final do so at their own risk and must bear the costs of any subsequent action reversing or revising the allotment decision.” *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders, Report and Order*, ¶ 11 (FCC 1996). WNNX has constructed the facilities authorized in *Report and Order*, 15 FCC Rcd. 9971 (DA 00-322) (65 Fed. (continued...))

fact that WNNX's transmitter/antenna system is to be located in the middle of the City of Atlanta. As was the case in 1991 in *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, because WNNX proposes to place its antenna in the City of Atlanta, the Commission must conclude that WNNX's proposal on this factor is extremely weak and that WNNX's proposal does not support the award of a first local service preference under this criterion.

8) Moreover, the *MO&O*, ¶ 6, is clearly erroneous when it indicates that the instant case is analogous to "situations involving a community outside of an Urbanized Area . . . [and] the Commission only requires a [*Tuck*] showing in proposals providing 50% coverage to an Urbanized Area." College Park is located within the Atlanta Urbanized Area and the *MO&O* is not remotely clear how this circumstance is analogous to a situation where the proposed community is located outside of the urbanized area. When a proposed community is located outside of an urbanized area, but proposes substantial coverage of the urbanized area, the Commission must set some marker to determine the point at which a *Tuck* analysis will be applied and the Commission chose 50%. The 50% issue simply does not arise when the proposed reallocation community, College Park instantly, is located within the urbanized area and where the antenna will be placed in the central city. See *Headland, AL and Chattahoochee, FL*, 10 FCC Rcd. 10352, 10354 ¶ 11 (Alloc. Br. 1995); *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd. at 6584 ¶ 24. Consequently, WNNX's substantial burden of proof⁶ in seeking to reallocate Station WHMA into

⁵(...continued)
Reg. 31498 (May 18, 2000)). Accordingly, WNNX's construction of the modified facility does not accrue any equitable considerations in its favor vis-a-vis this contested rule making proceeding.

⁶ Less evidence is required to show interdependence when the proposed city "smaller and close to the central city." Mr. Small's August 31, 1998 *Comments*, at 9, citing, *Faye & Richard* (continued...)

the Atlanta Urbanized Area is not lessened merely because WNNX's 70 dBu city grade contour will cover just barely less than 50% of the Atlanta Urbanized Area.⁷

9) The *MO&O*'s new reliance upon *Oraibi and Leipp, AZ*, 14 FCC Rcd. 13547 (1999) is misplaced because that case concerns a proposed community located 45 miles from the central city, the area between the communities is sparsely populated, and the proposed community is not a part of the Flagstaff Urbanized Area. *Oraibi and Leipp, AZ*, 14 FCC Rcd. 13547 ¶ 4. Instantly, College Park is only 2 miles from the City of Atlanta, Mr. Small *Comments*, at 8 n. 11 and the area is not sparsely settled, it is part of the densely populated Atlanta Urbanized Area.⁸ Moreover, unlike the instant case, the *Oraibi and Leipp, AZ* case concerns a mere proposal to change the name of the community listed on the license with no change in the transmitter location, i.e., moving closer to Flagstaff was not an issue, *Oraibi and Leipp, AZ*, ¶ 6, and the fact that 90% coverage of Flagstaff was proposed, a point which is highlighted in the *MO&O*, at ¶ 6, merely results from exactly the

⁶(...continued)
Tuck, 3 FCC Rcd. at 5378 ¶ 34.

⁷ The *MO&O*, ¶ 6, states that WNNX's proposal will provide service to 45% of the Urbanized Area. However, the *MO&O* completely fails to discuss the fact that WNNX's 70 dBu primary service contour "entirely cover[s] 'the adjacent metropolis,'" the City of Atlanta, or the fact that 77.7% of WNNX's proposed 70 dBu primary service area would lie within the Atlanta Urbanized Area, i.e., only 22.2% of WNNX's proposed primary service area would be outside of the Atlanta Urbanized Area. *Petition for Reconsideration*, at 2 ¶ 4. More than 75% of WNNX's proposed principal service contour will provide service to the Atlanta Urbanized Area. The *MO&O*'s failure to consider these points amounts to a failure to engage in reasoned decision making.

⁸ Cox argued that College Park "adjoins Atlanta along its eastern edge." *Comments of Cox Radio, Inc.*, at 6. Because Atlanta is so large compared to College Park, whether or not College Park actually touches Atlanta does not seem to be significant, but perhaps the Commission would clarify the point anyway.

same coverage which was authorized initially for the Class C facility. The circumstances at issue in the *Oraibi and Leipp* are substantially different from the circumstances presented instantly.

10) The MO&O's new reliance upon *Mullins and Briarcliffe Acres, SC*, 14 FCC Rcd. 10516 (1999) is also misplaced. First, the proposed community in *Mullins and Briarcliffe Acres* was located outside of the Myrtle Beach Urbanized Area. *Mullins and Briarcliffe Acres, SC*, 14 FCC Rcd. 10516 ¶ 3. Instantly, not only is College Park located within the Atlanta Urbanized Area, WNNX's transmitter site is located within the City of Atlanta. Second, the briefly worded *Mullins and Briarcliffe Acres, SC* case touches upon factors which demonstrate that the proposed community is, in fact, a community, such as through a demonstration of the source of municipal services. There is no discussion in *Mullins and Briarcliffe Acres, SC* which explains how the provision of municipal services has any bearing upon the issue of whether two communities are economically intertwined.

Size and Proximity to the Urban Center

11) Ten years ago the Commission determined that "Sandy Springs is directly adjacent to the city of Atlanta" and that "Sandy Springs is approximately one sixth [16.7%] the size of Atlanta in population." Accordingly, the Commission found that the first WHMA proposal to be extremely weak and not supportive of the award of a first local service preference. *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd. at 6585 ¶ 25. Instantly, College Park's population is one twentieth (5.0%) of the City of Atlanta's, and not only is the City of Atlanta closely proximate to College Park geographically, either adjoining or separated by only 2 miles, such that WNNX's proposed 70 dBu city grade contour would cover the entire City of Atlanta, and not only does WNNX propose to place its antenna in the City of Atlanta, the City of Atlanta actually owns 60.4% of College Park. After considering these facts and the Commission's

earlier legal conclusions, it is irrational to conclude that College Park's is sufficiently large and remote to warrant a first local service preference under this factor and the failure of the *MO&O* to consider these facts and earlier legal conclusions constitutes an unreasoned decision.

The *Tuck* Analysis

12) After failing to properly consider the Signal Coverage Issue and the Size and Proximity issue, the *MO&O* proceeds to a mechanical application of the *Tuck* factors. The first error in the *MO&O* is a failure to indicate whether the *Tuck* analysis is a "best out of eight competition," or whether the various factors are more important than others. The Commission has previously determined that "less evidence that the communities are interdependent would be required when the community at issue is smaller and close to the central city." *Petition for Reconsideration*, at 5 n. 2 citing *Faye and Richard Tuck*, 3 FCC Rcd. 5374, 5378 ¶ 34 (FCC 1988). The Commission has also determined, and again the *MO&O* fails to consider, that the ultimate purpose served by the *Tuck* analysis to ascertain whether there is "a commonality of interest based upon mutual economic reliance *between the specified community and the larger metropolitan area.*" *Petition for Reconsideration*, at 5 n. 2 citing *Faye and Richard Tuck*, 3 FCC Rcd. at 5378 ¶ 37 (emphasis added); *Petition for Reconsideration*, at 9-11 ¶¶ 18-21. The *MO&O* merely lists the *Tuck* issues without assigning weight to any particular item, without discussing the extent to which the evidence indicates a "commonality of interest" between College Park and the surrounding Atlanta Urbanized Area, and by erroneously limiting the *Tuck* analysis by focusing on the City of Atlanta rather than the Atlanta Urbanized Area.

13) **Work Patterns:** The *MO&O*, ¶ 7, relies upon *Coolidge and Gilbert, Arizona*, 11 FCC Rcd. 3610 (1996) to find WNNX prevails on the work pattern issue where College Park employs

16% of its population, while 84% work in the Atlanta Urbanized Area. Before we discuss *Coolidge and Gilbert, Arizona*, it is irrational to conclude that employment of 84% of College Park's work force outside of College Park does not demonstrate a commonality of interest or an economic reliance upon the Atlanta Urbanized Area by College Park. The issue is not whether some businesses in College Park employ some of College Park's residents, an issue which looks only at whether a "community" exists for allocation purposes, the issue is whether work patterns show a commonality of economic interests. To find irrelevant the fact that 84% of College Park's work force works outside of College Park in the Atlanta Urbanized Area is just plain mind boggling even without considering the fact that WNNX argued that "two of the most visible signs of College Park's economic independence are the Hartsfield Airport and the City-owned Convention Center," *Petition for Reconsideration*, at 8, n. 7 citing *WNNX Petition*, at 12, ¶18, Item 6. WNNX's *Petition* places principal economic reliance upon an airport which is owned by the City of Atlanta owns the "Hartsfield Airport" and the Convention Center which exists because of airport traffic. Mr. Small's August 31, 1998 *Comments*, at 16 ¶ 27. Because the *MO&O* fails to explain how WNNX's reliance upon the City of Atlanta's airport, and upon a convention center which caters to airport traffic, demonstrates College Park's economic independence from the Atlanta Urbanized Area, the *MO&O* fails to engage in reasoned decision making.

14) The *MO&O*'s failure to discuss that the "Hartsfield Airport" which is owned by the City of Atlanta is significant. WNNX claimed that "major employers located in the community and which employ primarily College Park residents include Hartsfield International Airport." *WNNX Petition*, p. 9 § 1. Mr. Small provided evidence that the airport and related businesses at the airport employ approximately 33,000 persons. Mr. Small's August 31, 1998 *Comments*, at Attachment B,

page 3 (information from the Airport's web site). College Park has a total population of just over 20,000, *WNNX Petition*, ¶ 15, a number which cannot possibly fulfill the employment requirements of even the Airport, much less the other "801 licensed businesses" located in College Park, i.e., workers from the surrounding area must fill these jobs. Mr. Small's August 31, 1998 *Comments*, at 13 ¶ 20. Mr. Small demonstrated that not only do a significant portion of College Park's residents work outside of College Park, Mr. Small demonstrated that College Park is dependent upon the other parts of the Atlanta Urbanized Area to fulfill the employment needs of the businesses located within College Park. The Commission's failure to consider this information renders its conclusion that WNNX prevails on the work pattern issue unreasonable.

15) The *MO&O*'s new reliance upon *Coolidge and Gilbert, Arizona*, to support reallocation of Station WHMA to College Park is clearly erroneous. The *MO&O* fails to discuss various material differences between *Coolidge and Gilbert, Arizona*, and the instant case and the determination the *Coolidge and Gilbert, Arizona*, is controlling is unreasonable. First, in *Coolidge and Gilbert, Arizona*, the proposed relocation did not result in any city grade signal being extended "over any part of the Phoenix Urbanized Area" and the Commission determined that the proponent prevailed on the signal population coverage issue. *Coolidge and Gilbert, Arizona*, 11 FCC Rcd. at 3611 ¶¶ 7 & 9. In stark contrast, WNNX proposes to cover the entire City of Atlanta with Station WHMA's 70 dBu city grade service contour, WNNX proposes to serve 45% of the Atlanta Urbanized Area with its city grade contour, and WNNX proposes that 77.7% of its proposed city grade contour will extend over the urbanized area, i.e., only 22.3% of WNNX's proposed city grade contour is located outside of the Atlanta Urbanized Area. *Coolidge and Gilbert, Arizona*, is not at all similar to the instant case.

16) Second, in *Coolidge and Gilbert, Arizona*, the Commission determined that because the proposed community was within 17.8 miles of Phoenix and because the proposed community's population of 29,188 was small compared to the Phoenix Urbanized Area's population of 2,006,239, 1.45%, that the size and proximity issue went against the proponent. *Coolidge and Gilbert, Arizona*, 11 FCC Rcd. at 3611 ¶¶ 7 & 9. Instantly, despite relying upon *Coolidge and Gilbert, Arizona*, the MO&O, finds that WNNX prevails on the size and proximity issue even though College Park's population of 20,457 is a mere 0.9% of the Atlanta Urbanized Area's population and even though College Park is only 2 miles from the City of Atlanta.⁹ Mr. Small's August 31, 1998 *Comments*, at 8 ¶ 12. The MO&O fails to explain why a 1.45% population comparison in *Coolidge and Gilbert, Arizona* went against the proponent, while an even smaller figure, a 0.9% population comparison, goes in WNNX's favor. The MO&O is unreasoned on this matter.

17) Third, in *Coolidge and Gilbert, Arizona*, 11 FCC Rcd. at 3611 ¶ 11, the Commission determined that 60% of the work force in the proposed community worked in the proposed community or nearby. The MO&O completely fails to explain how this 60% figure compares favorably to the 16% figure noted at ¶ 7 of the MO&O. Moreover, the issue is whether there is interdependence in the Atlanta Urbanized Area, do people in College Park go elsewhere to work and do people come into College Park to work, the issue not whether College Park employs several of its own residents. The fact that 84% of College Park's work force works outside of College Park in the Atlanta Urbanized Area, and the fact that College Park must import thousands and thousands of

⁹ The MO&O, ¶ 6, states that College Park's "population is only 5.2% of the population of the of Atlanta" To compare the MO&O *Coolidge and Gilbert, Arizona*, reference is made to the ratio of College Park's population to the Atlanta Urbanized Area.

workers from other parts of the Atlanta Urbanized Area demonstrates an economic interdependence between College Park and the Atlanta Urbanized Area.

18) **Local Newspaper:** The *MO&O*, at ¶ 7, finds that WNNX prevails on this issue, even though College Park does not have its own news paper, because two other communities publish a newspapers “which excludes Atlanta, national and international news, [and] sufficiently covers the needs and interests of College Park.” The *MO&O* fails to comment upon Mr. Small’s argument that “the fact that College Park is dependent upon another community for a particular service is indicative of urbanized dependence, and not independence” and that the requirement is for the proposed community to have newspaper, the requirement is not that a neighboring community have a newspaper. *Petition for Reconsideration*, at 6 ¶ 8. The Commission’s failure to consider this argument causes its conclusion to be unreasoned.

19) Moreover, the *MO&O* misconstrues the function of this *Tuck* factor, a factor which must be used to determine economic interdependence. The newspaper publication issue is not examined to determine the extent of news and issue coverage to determine whether College Park is adequately served by non-Atlanta newspapers as *MO&O* now frames the issue, the issue is whether College Park publishes its own newspaper which the Commission considers as showing economic independence, notwithstanding the fact that a purpose served by newspapers is to advertize to bring commerce to College Park from the surrounding Atlanta Urbanized Area. *See* Mr. Small’s June 16, 2000 *Petition for Reconsideration*, at 6 n. 4. The issue is one of economic relationships and the fact is that College Park relies upon another community in the Atlanta Urbanized Area for production and distribution of the newspaper. The *MO&O* is unreasoned because it fails to explain how College Park’s reliance upon other communities for newspapers demonstrates the lack of an economic relationship between

College Park and the Atlanta Urbanized Area. It is noted that in *Coolidge and Gilbert, Arizona*, 11 FCC Rcd. at 3611 ¶ 8, the proposed community had a local daily paper and two weekly papers.

20) Even if it were factually correct that “South Fulton Neighbor” “excludes Atlanta” as the *MO&O*, at ¶7, erroneously finds, *see Petition for Reconsideration*, at 6 n. 4,¹⁰ the analysis improperly limits the scope of the inquiry to whether the paper covers news and advertisements concerning the central city rather than the Atlanta Urbanized Area. The inquiry is to determine whether there is “a commonality of interest based upon mutual economic reliance *between the specified community and the larger metropolitan area.*” *Petition for Reconsideration*, at 5 n. 2 citing *Faye and Richard Tuck*, 3 FCC Rcd. at 5378 ¶ 37 (emphasis added).

21) The *MO&O* fails to consider that “College Park businesses reach the residents of [College Park] by advertising in Atlanta newspapers” which have significant penetration in College Park. *Comments of Cox Radio, Inc.*, at 8. Once again, the Commission fails to discuss a significant factor which indicates that the economies of College Park is intertwined with that of the Atlanta Urbanized Area, and the central city of Atlanta in this particular instance.

22) The *MO&O*’s new reliance upon *Elizabeth City, North Carolina and Chesapeake, VA*, 9 FCC Rcd. 3586 (1994) is misplaced because the Commission found in that case that “although Chesapeake has no daily newspaper, it has a weekly newspaper, several other non-daily local publications, and the local daily newspaper publication of a Chesapeake tabloid supplement three times a week.” *Elizabeth City, North Carolina and Chesapeake, VA*, 9 FCC Rcd. at 3589 ¶ 20.

¹⁰ While the Commission concludes that the “Fulton County Neighbor” excludes Atlanta, the *MO&O* is unreasoned on this point because it fails to discuss the facts that the paper is published on the other side of Atlanta from College Park, contains advertisements and job notices for business located in Atlanta, and fails to consider the fact that the editorial page of the paper is penned by persons with Atlanta by-lines. *Petition for Reconsideration*, at 6 n. 4.

Similarly, the *MO&O*'s new reliance upon *Ada, Newcastle and Watonga, OK*, 11 FCC Rcd. 16896, 16897 ¶ 3(b) (1996) on the newspaper issue is misplaced because in *Ada, Newcastle and Watonga, OK* the Commission determined that the proposed community "supports its own local newspaper." 11 FCC Rcd. 16896 ¶ 16. Unlike the proposals in *Elizabeth City, North Carolina and Chesapeake, VA*, and *Ada, Newcastle and Watonga, OK*, the instant case does not concern a community which publishes its own newspapers and the *MO&O*'s reliance upon these cases is misplaced.¹¹

23) Perceptions, Elected Officials, Telephone Directory, Zip Code: These items comprise the third, fourth, and fifth *Tuck* factors. While Mr. Small requested an analysis of how the various *Tuck* factors demonstrate the economic relationship between a proposed city of license and the urbanized area and the central city, *Petition for Reconsideration*, at 10 ¶ 20, the *MO&O* fails to provide the requested explanation. A *Tuck* analysis is performed to ascertain whether there is "a commonality of interest based upon mutual economic reliance *between the specified community and the larger metropolitan area.*" *Petition for Reconsideration*, at 5 n. 2 citing *Faye and Richard Tuck*, 3 FCC Rcd. at 5378 ¶ 37 (emphasis added); *Petition for Reconsideration*, at 9-11 ¶¶ 18-21. Whether someone in the proposed community views the community as being independent, or whether the community has an elected government, or whether the community has a newspaper, or whether the

¹¹ It is noted that the proposal in *Elizabeth City, North Carolina and Chesapeake, VA* concerned the reallocation of a signal from one of the urbanized area to another part of the urbanized area and no transmitter move was proposed. *Elizabeth City, North Carolina and Chesapeake, VA*, 9 FCC Rcd. at 3588 ¶ 16. Instantly, the WNNX proposes to move WHMA to the Atlanta Urbanized Area and construct its transmitter in the middle of the City of Atlanta. Moreover, whereas the urbanized area in *Elizabeth City, North Carolina and Chesapeake, VA* had no central city and the communities in the urbanized area were of relatively equal sizes, 9 FCC Rcd. at 3588 ¶ 16, the instant case contains a very large central city, Atlanta, and the sizes of the communities are not even remotely equal. *Elizabeth City, North Carolina and Chesapeake, VA* does not support grant of WNNX's proposal.

community has a telephone book, or whether the community has a zip code says nothing about the economic interrelationship between two communities. The economic relationship question is not answered by inquiring into factors which show that the proposed community is, in fact, a community for allocation purposes.

24) More instructive than most of the *Tuck* factors would be to look at how the Commission has treated Atlanta and College Park as economic units in other licensing matters. The City of Atlanta is in Fulton County while College Park is located mostly in Fulton, but somewhat in Clayton counties. Mr. Small's August 31, 1998 *Comments*, Attachment D, 1990 population census of College Park. For the purposes of the following discussion, the Commission associates Fulton and Clayton counties together in its economic analysis. College Park is located in the same Metropolitan Statistical Area (MSA #17) as Atlanta for cellular licensing purposes; is located in the same Regional Economic Area Grouping (REAG #2) as Atlanta for Wireless Communications Service licensing purposes; is located in the same Regional Economic Area Grouping (REAG #3) as Atlanta for 220 MHz licensing purposes; is located in the same Major Economic Area (MEA #8) as Atlanta; is located in the same Economic Area (EA #40) as Atlanta; is located in the same Major Trading Area (MTA #11) as Atlanta; and is located in the same Basic Trading Area (BTA #24) as Atlanta. The Commission has repeatedly determined that the all areas in Fulton County and Clayton county are economically, politically, and otherwise intertwined for the purpose of licensing numerous radio services. These markets and their associated county groupings were put assembled based upon economic and political considerations after rulemaking; in some cases, such as MSA and RSA development, the Commission relied upon its own decision making process, while in other cases the Commission relied upon Rand McNally (MTA & BTA) and the Bureau of Economic Analysis of

the Department of Commerce (MEA and EA). A reasoned decision must explain why the economic relationships of these areas are viewed differently for the purposes of the broadcast service only.

25) **Commercial Establishments, Health Facilities, Transportation Systems:** Similarly, the *MO&O*, ¶ 9, fails to explain how the existence of “802 licensed business establishments” evidences College Park economic independence from the Atlanta Urbanized Area. The Commission has previously determined that in proposing to relocate Station WHMA to the Atlanta Urbanized Area “the mere fact that there are some economic, political, and cultural organizations that identify themselves with” the proposed suburban community does not establish independence from the City of Atlanta. *Comments of Cox Radio, Inc.*, at 8, citing *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd. at 6585 ¶ 26. What is missing from the Commission’s analysis is any explanation of who works at these businesses and who utilizes these businesses. Moreover, the Commission ignored evidence that various businesses located in College Park

26) Mr. Small provided evidence that the airport and related businesses at the airport employ approximately 33,000 persons. Mr. Small’s August 31, 1998 *Comments*, at 12 ¶ 19, and Attachment B, page 3 (information from the Airport’s web site). Given the fact that College Park has a total population of just over 20,000, *WNNX Petition*, ¶ 15, a number which cannot possibly fulfill the employment requirements of even the Airport, much less the other “801 licensed businesses” located in College Park, the Commission’s conclusion that the mere existence of businesses, standing alone, demonstrates economic independence is unreasoned.¹²

¹² The Commission ignored evidence that “many College Park hotels actually include “Atlanta” rather than “College Park” in their name.” *Comments of Cox Radio, Inc.*, at 8.

27) The *MO&O* fails to consider that College Park, a city of only 20,000, *WNNX Petition*, ¶ 15 has at least 27 hotels and a large convention center. *Comments of Cox Radio, Inc.*, at 7. Perhaps all of College Park's residents live in hotels. More likely, the hotels serve the millions of travelers who utilize Atlanta's airport. The Commission's failure to discuss this fact causes the *MO&O* to be unreasoned.

28) The *MO&O* fails to discuss the fact that College Park "is entitled to 10.8% of the tax revenue" from the City of Atlanta's Airport. College Park thus depends upon property owned by the City of Atlanta for what WNNX views as significant tax revenues for College Park. Mr. Small's August 31, 1998 *Comments*, at 14 ¶ 23 citing *WNNX Petition*, at 24 § 10. The Commission has failed to explain why it considers that there is no economic interrelationship between College Park and the central city of Atlanta where College Park taxes a huge airport owned by the City of Atlanta. Moreover, even though the City of Atlanta's airport is located in College Park, the City of Atlanta is entitled to a lion's share of the tax revenue, 33.8%. Mr. Small's August 31, 1998 *Comments*, at 14 ¶ 23. The Commission has failed to explain why it considers that there is no economic relationship between College Park and the central city of Atlanta where Atlanta has authority to collect taxes for goods sold and for services rendered in College Park. It is an unusual relationship when one community is permitted to levy taxes in a neighboring community and the *MO&O* completely fails to discuss this peculiar circumstance. The tax issue is a significant indication of interdependence and the Commission's failure to discuss it constitutes a failure to engage in reasoned decision making.

29) While the *MO&O*, at ¶ 9, states that the existence of transportation systems "support our conclusion regarding the independence of College Park," the *MO&O* does not discuss a single

transportation system. The fact is, the *MO&O* fails to discuss the fact that College Park is dependent upon regional transportation systems “such as the airport, CSX rail, MARTA, and I-85/I-285” to get people to and from College Park’s business establishments. Mr. Small’s August 31, 1998 *Comments*, at 16 ¶ 26. Similarly, the Commission fails to explain how it can find that College Park is not dependent upon the Atlanta Urbanized Area where “College Park does not have a hospital within its borders, so its residents travel to Atlanta or other communities . . .” *Comments of Cox Broadcasting, Inc.*, at 9. Again, the issue is not whether one can get a band aid in College Park, the issue is whether College Park and the Atlanta Urbanized Area are intertwined. The failure to discuss these significant facts constitutes a failure to engage in reasoned decision making.

30) **Advertising Market:** The *MO&O*, ¶ 9, states that College Park is in a different advertising market from the Atlanta Urbanized Area because neither of the two small newspapers, neither of which is published in College Park, do not serve Atlanta. First, as discussed above, the Commission’s conclusion that the two papers do not serve Atlanta is incorrect as a factual matter and the *MO&O* fails to address various facts including the facts that Atlanta businesses advertise in the papers and the fact that the editorial page is penned by Atlanta business persons. Second, the Commission has not previously determined the existence of advertising markets by subjective determinations as to which audience a particular newspaper was trying to reach. Moreover, this approach relies upon a significant stretch by turning two small newspapers into decisive determinants of the advertizing market of a huge metropolitan area. Third, these newspapers serve other areas of the Atlanta Urbanized Area and the *MO&O* improperly accords significance to the newspapers by incorrectly stating that because Atlanta is excluded, no economic relationship is shown with the Atlanta Urbanized Area. Fourth, the *MO&O* fails to consider the evidence that

Atlanta newspapers have significant penetration in College Park and that College Park businesses advertise in the Atlanta newspapers. *Comments of Cox Radio, Inc.*, at 8.

31) What would have been significant to advertising relationships in a large urbanized area like the Atlanta Urbanized Area would have been reference to Arbitron or Nielsen advertising information. *See Ankeny and West Des Moines, Iowa*, 15 FCC Rcd. 4413 ¶ 3 (Alloc. Br. 2000). The *MO&O* fails to consider that College Park is part of the Atlanta Arbitron advertising service area. Alternatively, the Commission could have considered Exhibit D of *Comments of Cox Radio, Inc.* citing *Investing in Radio 1998, 1st Edition*, which shows that “the Atlanta radio market, like the Atlanta newspaper market, encompasses College Park.” *Comments of Cox Radio, Inc.*, at 8 & n. 31. Given the Commission’s stated concern for not “blindly” reallocating spectrum to urbanized areas, the Commission’s reliance upon two small newspapers when there are much more reliable sources of advertising data directly relating to broadcast radio, the *MO&O* is unreasoned on this score.

32) **Municipal Services and Zoning/Building/Plumbing Codes:** The *MO&O*, ¶ 9, finds that because College Park provides municipal services to 40% of its land area that College Park is not economically intertwined with the Atlanta Urbanized Area. The *MO&O* states that the 60% of College Park which is owned by the City of Atlanta for the Airport is not a concern regarding municipal services because “no resident of College Park lives at the Airport.” *MO&O*, n. 4. The issue is not whether someone lives on a particular piece of ground in College Park, the issue is whether the provision of municipal services demonstrates an economic relationship between College Park and the Atlanta Urbanized Area. The *MO&O* is plainly incorrect by stating that “there is nothing in the record of this proceeding indicating that the City of Atlanta provides any municipal services to College Park.” *MO&O*, n. 4. The same footnote states that Mr. Small provided evidence

that the City of Atlanta and various Atlanta-based businesses provide municipal services to the Airport, an airport which is located in College Park. Thus, the City of Atlanta provides municipal services to College Park even if the Airport is not a residential area.¹³

33) The conclusion that the Airport which occupies more than 60% of the land area of College Park may be excluded because “no resident of College Park lives at the Airport” is profoundly unreasoned. First, no resident lives at any of the other “801 licensed businesses,” or health care facilities, or local governments in College Park, yet the Commission is willing to credit those establishments to WNNX. It is irrational to require residency at the Airport where residency is not required at any of the other businesses and establishments. Second, if people from College Park constitute the substantial work force at the City of Atlanta’s Airport as WNNX claims, *WNNX Petition*, at 9 § 1, a factual statement which the Commission continues to ignore regarding economic interdependence, then certainly it would be appropriate to consider the municipal services to the Airport because those services would be utilized by College Park residents.

Conclusion

34) The *MO&O*, like the *Report and Order* before it, fails to discuss numerous significant factual and legal issues. The Commission’s orders to date read as if the purpose of a *Tuck* analysis were to determine whether College Park existed as an identifiable community for allocation purposes rather than whether the community of College Park has an economic relationship with the rest of the

¹³ The *MO&O* fails to explain how the existence of zoning, building, and plumbing Codes in College Park demonstrates that there is not economic relationship between College Park and the Atlanta Urbanized Area and the central city of Atlanta. Chances are that the building and plumbing materials which College Park utilizes are shipped through the Atlanta Airport, or arrive in a CSX distribution facility in the Atlanta Urbanized Area, and/or are trucked to College Park on a regional roadway.

Atlanta Urbanized Area. The Commission has said it would not be “blind” to attempts to move facilities into urbanized areas. However, in this case, the Commission’s failure to consider significant legal and factual matters indicates that the Commission has indeed closed its eyes to what it approved. The Commission’s conclusion that College Park is not economically intertwined with the Atlanta Urbanized Area cannot survive the light of day.

35) Mr. Small is entitled to fair consideration of the facts and the law. To date the Commission has ignored the facts and the law, including the fact that the Commission has already denied a reallocation of Station WHMA to the Atlanta Urbanized Area. In a fair proceeding the *Eatonton* case would have been the Commission’s starting point. As it is, Mr. Small must await the Commission’s third order to see if the Commission discusses WNNX’s “technical manipulation” of the allocation rules to move Station WHMA to the Atlanta market.

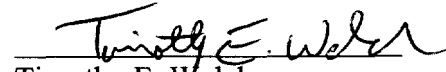
36) Running head-to-head with this obvious omission is the attempt in the *MO&O* to remove the Atlanta Airport from the consideration of economics in this case. WNNX’s *Petition* places principal reliance upon the existence of the airport as demonstrating College Parks economic independence. Whether anyone resides at the airport is completely irrelevant to the economic impact that the Atlanta airport has on College Park and the Atlanta Urbanized Area. By making what can only be characterized as an absurd effort to exclude the airport from the Commission’s economic calculus, the Commission is not only turning a “blind” eye to the facts, it is actively sticking its head into the sand in an effort to pave the way for a broadcast station to be reallocated to a large metropolitan area. At least that’s how it looks given the Commission’s nearly complete abdication to date of its obligation to address significant factual and legal matters.

WHEREFORE, in view of the information presented herein and in the earlier submitted documents, it is respectfully submitted that reconsideration is warranted and that Mr. Small's proposal should be granted.

Hill & Welch
1330 New Hampshire Ave., N.W. #113
Washington, D.C. 20036
(202) 775-0070
(202) 775-9026 (FAX)
welchlaw@clark.net

March 30, 2001

Respectfully submitted,
PRESTON W. SMALL


Timothy E. Welch

His Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this 30th day of March 2001 served a copy of the foregoing PETITION FOR RECONSIDERATION AND REQUEST FOR PROTECTION by First-Class United States mail, postage prepaid, upon the following:

Mark N. Lipp
Shook, Hardy and Bacon
600 14th Street, N.W. Suite 800
Washington, D.C. 20005-2004


Kathy Archer, Vice President
CapStar Broadcasting Partners
600 Congress Avenue #1400
Austin, TX 78701

Joan Reynolds
Brantley Broadcast Associates
415 North College Street
Greenville, AL 36037

James R. Bayes
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Kevin F. Reed
Dow Lohnes & Albertson PLLC
1200 New Hampshire Ave., N.W. #800
Washington, D.C. 20036

Erwin G. Krasnow
Verner Liipfert Bernhard McPherson and Hand
901 15th Street, N.W.
Washington, D.C. 20005


Timothy E. Welch